

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANTS
AND APPENDIX**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

IN THE

RECEIVED SEP 1 1943

United States Court of Appeals

Joseph W. Starnes
CLERK

FOR THE DISTRICT OF COLUMBIA.

No. 8560

106

ROBERT F. KLEPINGER, ET AL., *Appellants,*

v.

FRED B. RHODES, *Appellee.*

**Appeal from the District Court of the United States for the
District of Columbia.**

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SUBJECT INDEX.

	Page
Jurisdictional Statement	1
Statement of the Case	2
Implicit Conclusions of the Court Below.....	5
Statement of Point	7
Summary of Argument	8
ARGUMENT	9
I. A justifiable surmise as to what occasioned dismissal of the complaint is that the lower court regarded certain dictum in <i>Trist v. Child</i> , 21 Wall. 441, as authoritative,—in oversight of the complete disapproval thereof in <i>Barnes v. Alexander</i> , 232 U. S. 117	9
II. The rationale of this Court's opinion in <i>Morgen-thau v. Fidelity Deposit Co.</i> , 68 App. D. C. 163, 94 F. 2d 632, was wholly overlooked by the court below	13
III. Other judicial opinions and statements by legal writers which seem to have been overlooked by the court below when concluding that "the complaint fails to state a cause for relief in the nature of equity"	14
IV. Of course, the remedy of the appellants would be at law and in the Municipal Court of the District of Columbia if appellee had not constituted himself a trustee of a specific fund for the payment of his indebtedness to the appellants....	17
CONCLUSION	18

TABLE OF CASES.

	Page
<i>Bank v. Ins. & Trust Co.</i> , 17 App. D. C. 112	15
<i>Barnes v. Alexander</i> , 232 U. S. 117.....	10, 12, 13, 14, 17, 18
<i>Benedict v. Ratner</i> , 268 U. S. 353	18
<i>Cleveland Clinic Foundation v. Humphreys</i> , 97 F. 2d 849	16
<i>Exchange State Bank v. Surety Co.</i> , 28 F. 2d 485.....	16
<i>Hamer v. Skidway</i> , 124 N. Y. 538, 27 N. E. 256.....	16
<i>Hauslet v. Harrison</i> , 105 U. S. 401	15
<i>In Re Strand Music Hall Co.</i> , 3 De. G. J. & S. 147....	17
<i>Ketchum v. St. Louis</i> , 101 U. S. 306.....	15
<i>Legard v. Hodges</i> , 1 Ves. Jr. 478	17
<i>Lone Star Cement Corp. v. Swartwout</i> , 93 F. 2d 767.17,	18
<i>Marble v. Marble</i> , 304 Ill. 229, 116 N. E. 589.....	16
<i>Morgenthau v. Fidelity Deposit Co.</i> , 68 App. D. C. 163, 94 F. 2d 632	13, 14
<i>Pinch v. Anthony, et al.</i> , 8 Allen (Mass.) 536.....	16
<i>Rodick v. Gandel</i> , 1 De. G. M. & G. 763.....	12, 17
<i>Sexton v. Kessler</i> , 225 U. S. 90	15
<i>Skiddy et al. v. Atlantic M. & O. R. R. Co.</i> , 3 Hughes 320, 22 Fed. Cases 274	16
<i>Trist v. Child</i> , 21 Wall. 441	9, 11, 14
<i>Union Trust Co. of Md. v. Townshend</i> , 101 F. 2d 903..	17
<i>Valdes v. Larrinago</i> , 233 U. S. 705	16
<i>Walker v. Brown</i> , 165 U. S. 654	15
<i>Wardman v. Leopold</i> , 66 App. D. C. 111, 85 F. 2d 277..	16
<i>Wylie v. Cox</i> , 15 How. 415	10, 11, 15
 Texts:	
Bispham	16
Pomeroy	8
Story	8, 15

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8560

ROBERT F. KLEPINGER; MIRIAM KLEPINGER;
AARON W. KLEPINGER; WARREN P. KLEP-
INGER; AND GEORGE F. EVANSON, *Appellants*

v.

FRED B. RHODES, *Appellee*

Appeal from a Judgment of the District Court of the United
States for the District of Columbia.

BRIEF AND APPENDIX FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

The original jurisdiction below. The first paragraph of the complaint consists exclusively of this compound sentence: "1. This is an action to enforce discharge of the obligation of an express trust, or, in the alternative, for money

judgments; and jurisdiction thereover is existent under D. C. 1940 ed. 11-306. (Appellants' App. 2.)

The proceedings below. The only hearing and determination below were on a motion to dismiss the complaint, the assigned ground for the motion being, "That the amount claimed [to wit, \$1980.00] is not within the jurisdiction of the Court." (Appellants' App. 21.)

The judgment below. The plaintiffs and the defendant, by their respective attorneys, treated the motion as though the ground assigned therefor was that the complaint failed to state a cause of action adjudicable pursuant to the principles of equity, i.e., that the complaint failed to state a cause of action arising on "the obligation of an express trust." The text of the judgment below is this:

"Judgment Dismissing Complaint.

"This cause came on to be heard at this term on the motion of the defendant to dismiss the complaint for want of jurisdiction in equity, and thereupon, upon consideration thereof, it is this tenth day of June, 1943 ADJUDGED as follows:

"1. That the said motion be, and the same hereby is, sustained, and the complaint is hereby dismissed upon the ground that the complaint fails to state a cause for relief in the nature of equity". (Appellants' App. 22.)

The appellate jurisdiction here. That from such a judgment an appeal lies to this Court is beyond question in the light of the provisions of District of Columbia Code (1940 ed.) 17-101.

STATEMENT OF THE CASE.

The judgment below was final with regard to what the complaint primarily sought, namely, equitable relief. That relief for the appellants, if any, was at law and in the Municipal Court of the District of Columbia, since the asserted monetary liability to them of the appellee was less than three thousand dollars, was, therefore, and necessarily, the

final judgment of the court below. That the appellants had mistaken both their remedy and their forum was, therefore, the final judgment which is challenged by this appeal.

The facts deemed by the appellants to be material under the sole question raised on this appeal,—to wit, did the court below err prejudicially to the appellants in adjudging as aforesaid,—are, of course, found not elsewhere than in the complaint. Concisely stated they are these:

1. That in the period from on or about July 1, 1938 to August 1, 1942 the appellant Robert F. Klepinger was associated in the practice of law in the District of Columbia with the appellee, under the style, to wit, Rhodes, Klepinger & Rhodes, pursuant to two written agreements of association, each of which obligated the appellee to maintain offices for the association at his individual expense. (Paragraphs I and II and Exhibits A and B to the complaint. Appellants' App. 2, 3, and 13-19.)

2. To enable him to discharge the aforesaid obligation of maintenance of offices at his individual expense, appellee, in July, 1940, obtained a loan of \$500.00 from the father and uncle of the appellant Robert F. Klepinger, namely, the appellants Aaron W. Klepinger and Warren P. Klepinger, respectively. The inducement to the making of such loan was a written declaration of trust, executed by Messrs. Rhodes, Klepinger & Rhodes, i.e., by the appellee, by the appellant Robert F. Klepinger, and by the other member of the aforesaid association, Cooper B. Rhodes. Such declaration of trust was addressed to the aforesaid Aaron W. and Warren P. Klepinger. The following is quoted therefrom:

“In consideration of a loan of \$500.00 evidenced by note dated July 23, 1940, given in said sum, we agree that for your protection, in the repayment of said loan, we hereby assign all our fees in the first judgments to be awarded in the U. S. Court of Claims in the cases now represented by this office and agree to consider

the same as a trust fund for your benefit". (Pars. IV, V, and VI of the complaint. Appellants' App. 4, 5.)

3. That to further enable him to discharge the aforesaid obligation of maintenance of offices at his individual expense, the appellee also in July, 1940, obtained a loan of \$230.00 from the sister of the appellant Robert F. Klepinger, namely, the appellant Miriam Klepinger. (Par. VII of the complaint. Appellants' App. 6.)

4. That for the purpose of enabling him to promote a commercial enterprise in which he was interested, the appellee in April, 1941, obtained the sum of \$900.00 from a life-long friend of the appellant Robert F. Klepinger, namely, the appellant George F. Evanson. That the appellee requested the appellant Robert F. Klepinger to assure the appellant George F. Evanson that repayment of such loan would be made "not later than May 1, 1941." (Par. VIII of the complaint. Appellants' App. 6, 7.)

5. That no part of any of the aforesaid several indebtednesses having been repaid in February, 1942,—and the appellee having subsequent to the date of execution of the aforesaid declaration of trust of fees, received fees which that declaration of trust obligated him to pay to the appellants Aaron W. Klepinger and Warren P. Klepinger, but which he diverted to other uses or purposes exclusively his own,—demand was made on the appellee for security for repayment of the aforesaid several indebtednesses. The demand was acceded to, but only after the appellee had obtained from the appellant Robert F. Klepinger a promise, which was subsequently fulfilled, to make a loan of \$250.00 to the appellee. (Par. IX of the complaint. Appellants' App. 7-10.)

6. Compliance with the aforesaid demand was made by the execution on February 11, 1942 of an assignment by the appellee to the appellant Robert F. Klepinger of "the sum of \$1980.00 out of the fee of \$2919.19, payable to

Rhodes, Klepinger & Rhodes in the case of North Pacific Emergency Export Association, No. 45190, U. S. Court of Claims (decided January 5, 1942, judgment of \$11,679.97)", it being declared in such assignment as follows:

"this assignment shall constitute and be regarded as an attorney's lien on said fee in favor of Robert F. Klepinger to insure collection and payment of the sum of \$1980.00 aforesaid * * *". (Par. IX of the complaint. Appellants' App. 7-10.)

7. That after receipt of the aforesaid fee of \$2919.19 by the appellee, demand upon him for payment of the aforesaid amount of \$1980.00 was made by the appellant Robert F. Klepinger, but the appellee refused to comply therewith, although admitting (1st) that he had executed the aforesaid assignment and declared the aforesaid fee to be subject to an "attorney's lien in favor of Robert F. Klepinger to insure collection and payment of the sum of \$1980.00 aforesaid", (2d) that he had in his possession as a part of such fee the sum of \$1980.00 and purposed and intended to disburse it as provided in said assignment, but stated that he would retain it in his possession until the appellant Robert F. Klepinger had fulfilled conditions as follows: (a) exhibited to the appellee copies of the said Klepinger's income tax returns for the calendar years 1940, 1941, and 1942, and (b) responded to numerous inquiries by the appellee concerning the business or affairs of the association of Rhodes, Klepinger & Rhodes. (Par. XI of the complaint. Appellants' App. 10-12.)

IMPLICIT CONCLUSIONS OF THE COURT BELOW.

In the light of the foregoing statement of the case and of the text of the judgment rendered below, these propositions seem clearly evident—

1. That it was the unexpressed, but clearly implied, opinion of the court below, that while appellee was the author of a written instrument that explicitly imposed upon him

an obligation to the appellants, namely, an obligation to pay to them the sum of \$1980.00 out of a specific fund immediately upon the coming of such fund into his possession, nevertheless the appellants were not the intended beneficiaries of a trust created by the appellee, and hence that equity was not available to the appellants for effectuation of the discharge of such obligation by the appellee.

2. That it was also the unexpressed, but clearly implied, opinion of the Court below, that while the appellee declared in writing that an attorney's lien on behalf of the appellants should attach to a specific fund upon its coming into the appellee's possession, nevertheless such a declaration by him was utterly ineffectual to create a lien that was enforceable by the processes of equity.

3. That it was the unexpressed, but clearly implied, opinion of the court below that while the appellee has admitted as follows:

(a) That he obligated himself to pay to the appellants \$1980.00 out of a specific fund upon the coming of such fund into his possession and declared such fund subject to an attorney's lien to the extent of \$1980.00, in order to insure or secure payment of that amount to the appellants,

(b) That such fund has come into his possession, and

(c) That he holds \$1980.00 for the purpose of discharge of his aforesaid obligation and also for the purpose of satisfaction of the aforesaid attorney's lien,

nevertheless a court of equity is without jurisdiction to determine whether the only grounds which the appellee has ever assigned for his refusal to discharge his aforesaid obligation and to satisfy the aforesaid attorney's lien are grounds justifying the refusal. (For such assigned grounds, see par. XI of the complaint. Appellants' App. 10-12.)

4. That it was the unexpressed, but clearly implied, opinion of the court below that the recently reconstructed Mu-

nicipal Court of the District of Columbia,—which is without jurisdiction in equity,—is the only forum in said District which has original jurisdiction to hear and determine such a complaint as that filed by the appellants, notwithstanding that the allegations of that complaint, all of which are admitted for the purposes of this litigation in its instant stage, disclose acts and conduct by the appellants and appellee which evidence a mutuality of construction, interpretation, understanding, and appreciation of the instrument of assignment of February 11, 1942 and the attorney's lien declared therein as a declaration of trust of moneys by the appellee for the benefit of appellants,—an appropriation or dedication by the appellee of the moneys in a specific fund for particular uses or purposes exclusively on behalf of the appellants.

STATEMENT OF POINT.

There is only one point on which the appellants rely. It is that the lower court erroneously decided that the foregoing facts, admitted by the appellee for the purposes of his motion to dismiss, failed to constitute a cause of action in equity. While suits in equity and actions at law are phrases which the Rules of Civil Procedure have caused to be misnomers, nevertheless equity is not less distinct and separate from law in the system of Federal jurisprudence now than at any time in the history of the American Government. Unification of mere procedure in that system has not altered or affected in the slightest the constitutionally ordained distinctness and separateness therein of the principles of equity and the rules of law.

But the foregoing observation anent the constitutional cleavage between law and equity is not intended to imply that the lower court's judgment in this case is expressive of dissent by that court from that observation. As respectfully contended on behalf of the appellants, the lower Court only misapprehended or misconceived the expanse or orbit of equity, with the result,—if the appellants had

abided the lower court's judgment and continued in pursuit of the appellee for recovery from him of \$1980.00,—there would necessarily be relegated to the Municipal Court of the District of Columbia, a court without jurisdiction in equity, a cause of action which should be heard and determined in the District Court agreeably with the principles of equity.

SUMMARY OF ARGUMENT.

Appellants' contention is that the range or scope of equity in the field of Federal jurisprudence is whatever the Supreme Court of the United States has determined it to be; and that the said Court has clearly declared that an oral or written promise by a debtor to a creditor to discharge a specific obligation out of a specific fund, regardless of the mere form of expression of the promise, is not only creative of a lien upon the fund on behalf of the promisee,—a lien that is enforceable in equity,—but also constitutes the promissor a trustee of such fund for the promisee.

Summarization of the argument in support of such contention is made in this statement, to wit, that it is impossible duly to study a pronouncement by Associate Justice Holmes in his capacity as such Justice, and the opinions in the English cases which he cites therein,—a pronouncement by that profound scholar in American and English law which has never been qualified in any respect whatever,—without conceding the perfect soundness of the aforesaid contention by the appellants. Nor can one have confidence in the statements of Story and Pomeroy in their respective treatises on equity jurisprudence without being unqualifiedly committed to approval of the appellants' contention. (Story, vol. 2, sec. 1231; Pomeroy, 5th ed., vol. 4, pp. 691-786, especially sec. 1235.)

ARGUMENT.

I. A Justifiable Surmise as to What Occasioned Dismissal of the Complaint is That the Lower Court Regarded Certain Dictum in *Trist v. Child*, 21 Wall. 441, as Authoritative,—in Oversight of the Complete Disapproval Thereof in *Barnes v. Alexander*, 232 U. S. 117.

That the appellee intended to assign for the benefit of the appellants a part of a specific fund which he expected to receive, is manifest from the terms or provisions of his instrument of assignment and creation of a lien, of February 11, 1942. And that he intended that the appellants should look to such fund and to the lien he created thereon as security for repayment of their respective loans to him, is a matter of fact which is equally manifest. The court below was not unaware of these patent realities. It perceived them clearly, but mistakenly concluded that an equity was not existent in the appellants solely because the instrument of purported assignment and of purported creation of a lien was not executed with regard to a fund either in the possession, or that was to come into the possession, of one who held it or who would hold it as property of the appellee.

In short, the court below erroneously concluded that an equitable lien arises and a trust is created only where there are at least three parties involved,—as is usual in cases of a time or sight draft,—to wit, a drawer, a payee, and a drawee. It erroneously concluded that where only two parties were involved, namely, a promissor and a promisee,—the former a debtor and the latter a creditor,—and the agreement of promise was merely that when, if ever, a specific fund came into the possession of the promissor he would pay or deliver it to the promisee, such an agreement, per se, was impossible of effect as a transfer or assignment of such fund.

Therein the lower court's erroneous conclusion is entirely consistent with the doctrine in *Trist v. Child*, 21 Wall.

441, 447, which was disapproved utterly in *Barnes v. Alexander*, 232 U. S. 117, 120. Such thoroughly repudiated doctrine is this:

“* * * A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *But a mere agreement to pay out of such fund is not sufficient.* Something more is necessary. There must be an appropriation of the fund, pro tanto, *either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor*”. (Emphasis supplied.)

That disapproval or repudiation of the foregoing dictum was unqualified or plenary is evident from the facts in *Barnes v. Alexander*, *supra*; from passages in the opinion therein; from the American and English cases cited in the opinion; and from the Court's judgment. Those of such facts that are pertinent here are these: A firm of lawyers, Barnes and Martin, orally agreed with two other lawyers, Street and Alexander, for payment to the latter of one-third of a fee if and when received by the former. “The whole matter rests on the conversations, in one of which Barnes said to Street and Alexander: ‘If you will attend to this case I will give you one-third of the fee * * *’”. In affirming a judgment for Street and Alexander, the Court remarked:

“* * * The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon *Trist v. Child*, 21 Wall. 441. * * * This decision [i. e., the decision in *Trist v. Child*, *supra*] so far as it concerns us here, seems to have overlooked *Wylie v. Cox*, 15 How. 415, * * *. The remarks in *Trist v. Child* were not necessary to the decision which was placed mainly on other grounds, so that at least we are warranted in treating the question as at large.” (Emphasis supplied.)

Referring to the extreme informality of the agreement for payment by Barnes to Street and Alexander of one-third of the fee, and to the lack or want of what was declared in *Trist v. Child*, *supra*, to be the sine qua non of a right to invoke equity, to wit, a third party who is the holder of the fund and to whom the owner thereof has directed an order for transfer of all or part of it to another, the Court said:

“* * * an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired * * *. Obviously the only thing intended or desired was to give the appellee a claim to one-third of the fund received by Barnes *if and when he should receive it* * * *. At the latest the moment the fund was received the contract attached to it as if made at that moment. * * *” (Emphasis supplied.)

Classifying the promisor of one-third of the fee as a trustee thereof for the promisee, the Court said:

“And it is one of the familiar rules of equity that a contract to convey a specific object *even before it is acquired will make the contractor a trustee* as soon as he gets a title to the thing.” (Emphasis supplied.)

Characterizing as “plain good sense” the proposition that Barnes’ promise to pay to Street and Alexander from a specific fund if and when received by the former was creative in the latter of an equitable interest in the fund, and declaring that such proposition accords with judicial authority, both American and English, the Court spoke thus:

“The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the principle not only of *Wylie v. Cox*, *supra* [which, as the Court remarked, the author of the opinion in *Trist v. Child*, *supra*, seems to have overlooked], but of *Ingersoll v. Coram*, 211 U. S. 335, 365-368, which cites it and later cases. See further to the same point, *Burn*

v. Carvalho, 4 My. and Cr. 690, 702, 703. *Rodick v. Gandell*, 1 DeG., M. & G., 763, 777, 778. *Harwood v. LaGrange*, 137 N. Y. 538, 540. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. *There is or ought to be but one rule, that suggested by plain good sense.*" (Emphasis supplied.)

The application of the "plain good sense" rule in the instant case would be vindicated by the additional reason stated for its application in *Barnes v. Alexander, supra*, namely, "That after making their contracts the parties seemed to have construed them as we have done." The appellee here has construed his assignment of February 11, 1942 as imposing upon him an obligation as trustee for the appellants; and such is precisely the construction which the latter have always made of such assignment. The appellee here has so construed that instrument under his admissions (Par. XI of the complaint, Appellants' App. 10-12), (1st) that he has acquired the entire fund described in the instrument of assignment of February 11, 1942, and (2d) that out of such fund he has retained and holds for the benefit of the appellants the sum of \$1980.00.

Unless *Barnes v. Alexander, supra*, has ceased to be authority; unless Story and Pomeroy are unreliable interpreters of the views of American and English jurists in expounding and applying the principles of equity, the court below has manifestly erred in adjudging that the remedy of the appellants, if any, is at law only and in the Municipal Court of the District of Columbia only, and not in equity and in the District Court of the United States for the District of Columbia.

II. The Rationale of This Court's Opinion in *Morgenthau v. Fidelity Deposit Co.*, 68 App. D. C. 163, 94 F. 2d 632, was Wholly Overlooked by the Court Below.

The reasoning of this Court in the case cited immediately above is faithfully and fully consonant with the reasoning of the Supreme Court in *Barnes v. Alexander*, *supra*, on the matter of what is controlling and dominant in determining the question whether a transaction between two persons,—a debtor and a creditor,—gives rise to an equitable lien upon a specific fund to which one of them is *legally entitled*. A contractor with the United States is *legally entitled* to payment by the United States upon the completion of his contract. But he cannot *legally* assign to another what is due to him from the United States. However, when his intention or purpose in executing an assignment of what is due to him from the United States is solely the furnishing of security to the surety on his bond for reimbursement of the latter for expenditures made in completing the contract, equity will interpose to hold him to or compel him to abide such intention or purpose, notwithstanding that the written instrument of assignment of what is due him from the United States is *illegal and unenforceable as such*.

Morgenthau v. Fidelity Deposit Co., *supra*, illustrates or exemplifies brilliantly such interposition by equity. Declaring in its opinion therein that it was “sustained by reason and authority” in so doing, this Court deemed the fact-situation.—i. e., the intention or purpose both in the giving of the assignment merely as security and in the acceptance of it merely as security,—such as to create in the surety by operation of the principles of equity on such fact-situation, and hence of the operation of the law thereon, an “equitable right * * * to demand and receive the balance due from the United States” under the contract. In other words, consistently with the “plain good sense” to which reference is made in *Barnes v. Alexander*, *supra*, this Court held that the contractor's written assignment ceased to be a factor in the case as effectually as

though it had never been executed, and that the sole factor therein was the evident intent or purpose of the contractor to cause what was owing to him by the United States to stand and be security for what was owing by him to his surety. This is patent from the closing words of this Court's opinion:

"The government [i. e., Treasury officials] contends that the surety has no valid claim on the fund involved because under R. S. sec. 3477 * * * the assignment was void. So far as a *legal* assignment is concerned much may be said in favor of this contention, but we do not have to pass on this point because R. S. sec. 3477 has never been construed to apply to assignments by *operation of law* [that is to say, by the operation of the principles of equity]. * * * Accordingly we may ignore the assignment by Durso [the contractor] to the surety and regard only the assignment [the equitable assignment] which, on account of the situation of the parties the law [the principles of equity] has effected." (Emphasis supplied.)

The "plain good sense" which was given effect in *Barnes v. Alexander, supra*, and in *Morgenthau v. Fidelity Deposit Co., supra*, should have been given effect in this case. That it was not, can be fairly accounted for upon no other theory than that the court below rated the afore-said thoroughly dicredited dictum in *Trist v. Child, supra*, as authoritative judicial doctrine.

III. Other Judicial Opinions and Statements by Legal Writers Which Seem to Have Been Overlooked by the Court Below When Concluding That "the Complaint Fails to State a Cause for Relief in the Nature of Equity.

Opinions of the Supreme Court.

The remedy in equity. "It is objected that equity can exercise no jurisdiction in the case, as adequate relief may be obtained at law. There may be a legal remedy, and yet

if a more complete remedy may be had in chancery, it is a sufficient ground for jurisdiction." *Wylie v. Cox*, 15 How. 415.

The trust in virtue of an equitable lien upon a specific fund. Story's Equity, vol. 2, sec. 1213, to the effect that an agreement which is creative of an equitable lien also "raises a trust", is referred to approvingly in *Ketchum v. St. Louis*, 101 U. S. 306.

The fiduciary relation between a debtor and a creditor under an agreement to subject specific property of the former to an equitable lien on behalf of the latter. "If Bayer had in disregard and in violation of his agreement undertaken to divert the skins, to some other and unauthorized use, it would have been in fraud of the rights of Hauslet, and a court of equity would not have hesitated by an injunction to prevent the commission or continuation of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property * * *". *Hauslet v. Harrison*, 105 U. S. 401.

Other opinions of the Supreme Court of the United States to the same effect are:

Walker v. Brown, 165 U. S. 654;
Sexton v. Kessler, 225 U. S. 90;
Valdes v. Larrinago, 233 U. S. 705.

Opinions of This Court.

Antecedent debt as a consideration for an agreement that is effective to create an equitable lien. " * * * As a general rule anything written, said or done, in pursuance of an agreement * * * in consideration of an antecedent debt, to place a * * * fund out of the control of the owner, and appropriate it to or in favor of another person, amounts to an equitable assignment." *Bank v. Ins. & Trust Co.*, 17 App. D. C. 112, 123.

The doctrine of equitable lien is not peculiar to any specific genus or species of obligations. " * * * on the

question of whether or not an equitable lien is created upon the fund under the circumstances in the present case, it is immaterial whether it be for an attorney's fee, as in the *Barnes* and *Ingersoll* Cases; or for the fee of an engineer, as in the *Harrah* Case; or for the fee of tax specialists, as in the instant case." *Wardman v. Leopold*, 66 App. D. C. 111, 115, 85 F. 2d. 277.

Opinions of Inferior Federal Courts in the States.

"*A court of equity will raise equitable liens for the purpose of justice.*" "A court of equity considers that as done which ought to be done in order more fully to effectuate the intention of the parties. It will, therefore, consider that as a lien which so intended to be by the parties." *Skiddy et al. v. Atlantic M. & O. R. R. Co.* (C. C., E. D., of Va.), 3 Hughes 320, 355, 536, 22 Fed. Cases (Case 12,922) 274, 288.

An equitable lien may arise ex aequo et bono, or it may arise out of an express contract. To this proposition are cited *Pomeroy* and also *Bispham* in *Exchange State Bank v. Surety Co.*, 28 F. 2d. 485, 487.

Fundamental maxims of equity underlie the doctrine of equitable lien. *Cleveland Clinic Foundation v. Humphreys*, 97 F. 2d 849, 856.

Opinions of State Courts.

The relation of trustee and cestui que trust begins and that of debtor and creditor ceases when a specific fund is appropriated or dedicated to satisfaction of the obligation. *Marble v. Marble*, 304 Ill. 229, 240, 136 N. E. 589, 594.

A trust is raised by an agreement that creates a charge or claim in the nature of a lien. *Pinch v. Anthony, et al.*, 8 Allen (Mass.) 536.

The language of the promissor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *Hamer v. Skidway*, 124 N. Y. 538, 550, 27 N. E. 256, 258.

Opinions of Courts of England.

Equity will decree performance of the trust under an agreement to dedicate a specific fund to the discharge of an obligation. *Legard v. Hodges*, 1 Ves. Jr., 478, decided in 1792. See the same case as reported in 3 Bro. C. C. 531. "An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund" is creative of an equitable lien upon the fund. *Rodick v. Gandel*, 1 DeG., M. & G. 763, 778, decided in 1852 and cited in *Barnes v. Alexander*, 232 U. S. 117. The intention of the parties to an understanding or agreement is determinative as to whether they stand in a relation to each other which is governed by a "principle, universally prevailing in this court, that what is agreed to be done is considered as done". In *Re Strand Music Hall Co.*, 3 DeG. J. & S. 147, decided in 1865.

IV. Of Course, the Remedy of the Appellants Would be at Law and in the Municipal Court of the District of Columbia if Appellee Had Not Constituted Himself a Trustee of a Specific Fund for the Payment of His Indebtednesses to the Appellants.

"The reason at the basis of the rule that a mere agreement to pay a debt out of a fund creates no lien on the fund, is that, *where there is no appropriation of a part of the fund to the payment of the debt*, the whole remains under the unfettered dominion of the debtor and the failure on his part to carry out the agreement is a mere breach of contract, no different in character from his failure to pay the debt. *Lone Star Cement Corp. v. Swartwout*, *supra* [93 F. 2d 767]; *Benedict v. Ratner*, 268 U. S. 353, 364 * * *." *Union Trust Co. of Md. v. Townshend*, 101 F. 2d. 903. (Emphasis supplied.)

To the foregoing statement no exception is taken by the appellants since it is evident that appellee's assignment of February 11, 1942 distinctly made an "appropriation of a part of the fund to the payment of the debt" to appellants. It is worthy of note that in neither of the two cases that

are cited as authorities for the statement, was it necessary to a decision therein to enter upon a discussion of the doctrine of equitable lien; and the Supreme Court of the United States did not do so in its opinion in *Benedict v. Ratner*, *supra*, a case arising under and adjudged on the provisions of the bankruptcy laws. The opinion of the Fourth Circuit Court of Appeals in *Lone Star Cement Corp. v. Swartwout*, *supra*, however, contains a pure dictum on such doctrine that is a dissertation on an irrelevancy which is more extensive than its discussion of the issues that were determinative in the case, namely, issues arising on the provisions of the bankruptcy laws.

CONCLUSION.

Since "plain good sense" apprehended that the facts in *Barnes v. Alexander*, *supra*, entitled Alexander to "relief in the nature of equity"; since the allegations of fact in the appellants' complaint, all admitted by the motion of the appellee to dismiss, clearly show that the appellee, in writing, promised to pay his indebtednesses to the appellants out of a specific fund, and thereafter admitted (1st) that such fund had come into his possession, (2d) that he has retained out of such fund the amount (\$1980.00) which he so promised to pay out of it to the appellants; and (3d) that he holds such fund for payment to the appellants, but refuses to pay it,—

Why, therefore, may not the appellants be thoroughly convinced, as they are, that the lower Court's judgment, to wit, that the complaint "fails to state a cause for relief in the nature of equity", wrongly denies to them that protection in and by equity to which they are entitled, and, therefore, that this Court should and will reverse such judgment.

Respectfully submitted,

PATRICK H. LOUGHRAN,
1147 Connecticut Avenue, N. W.,
Washington, D. C.,

Attorney for appellants.

APPENDIX

INDEX TO APPENDIX.

	Page
Complaint	2
Exhibit "A"	13
Exhibit "B"	17
Interrogatories * * as provided by Rule #33, Federal Rules of Civil Procedure	21
Motion to Dismiss	21
Judgment Dismissing Complaint	22
Order in the Matter of Security for Costs on Appeal... .	22
Memorandum of Cost Bond approved & filed.....	23
Notice of Appeal	23
Appellants' Designation of Record	24

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8560.

ROBERT F. KLEPINGER, ET AL., *Appellants*,

v.

FRED B. RHODES, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

APPENDIX.

1 Endorsed: Filed Apr 27 1943 Charles E. Stewart,
Clerk.

District Court of the United States
For the District of Columbia

Civil Action No. 19504.

ROBERT F. KLEPINGER, 1147 Connecticut Ave., N. W.,
Washington, D. C.;

MIRIAM KLEPINGER, 137 Springdale Road,
York, Pennsylvania;

AARON W. KLEPINGER, 2128 Third Avenue,
Los Angeles, California;

WARREN P. KLEPINGER, 2128 Third Avenue,
Los Angeles, California; and

GEORGE F. EVANSON, 25 Broadway,
New York City, N. Y.,

Plaintiffs,

vs.

FRED B. RHODES, National Press Building,
Washington, D. C.,

Defendant.

Complaint

I. This is an action to enforce discharge of the obligation of an express trust or, in the alternative, for money judgments; and jurisdiction thereover is existent under Title 11, section 306, District of Columbia Code, 1940 edition.

2 II. That from on or about July 1, 1938 to on or about August 1, 1942, the plaintiff, Robert F. Klepinger, and the defendant, and also the latter's son, Cooper B. Rhodes, were associated in the general practice of law in the District of Columbia under the firm name and style of "Rhodes, Klepinger and Rhodes", pursuant to a written agreement made on or about the 25th day of June, 1938, a copy of which agreement is hereto annexed as Exhibit A. That another and fourth attorney was also a party to the aforesaid agreement, but withdrew therefrom on or about December 7, 1938, and was never in any

way connected with or related to any of the transactions on which this complaint is founded.

III. That in June, 1940, the plaintiff, Robert F. Klepinger, proposed to the defendant and the aforesaid Cooper B. Rhodes that the aforesaid association be "dissolved and terminated" effective in the said month or as soon thereafter as might be practicable, but yielding to persuasion by the defendant and the aforesaid Cooper B. Rhodes, the plaintiff, Robert F. Klepinger, became a party to a written agreement with them, which was made or entered into on July 25, 1940, that the said plaintiff "take a leave of absence for one year from the date of this agreement from the firm of Rhodes, Klepinger and Rhodes"; that the aforesaid agreement, a copy of which is hereto annexed as Exhibit B, provides, inter alia, that "the firm name of Rhodes, Klepinger and Rhodes will be used by Fred B. Rhodes and Cooper B. Rhodes for a period of one year from the date hereof after which time a further agreement will be entered into by the parties hereto." That neither at the expiration of such period, nor at any time subsequent to July 25, 1940, has the plaintiff, Robert F. Klepinger, been a party to any written or other agreement whatever affecting the provisions in the association agreements aforesaid; but on or about July 1, 1942 the said plaintiff, in the exercise of his right under the 9th paragraph of the aforesaid agreement of June 25, 1938 to withdraw from the aforesaid association "upon thirty days notice in writing", gave notice in writing to the defendant and the aforesaid Cooper B. Rhodes of the said plaintiff's withdrawal therefrom, effective on or about August 1, 1942.

IV. That in July, 1940 the members of the aforesaid association, that is to say, the defendant, and the aforesaid Cooper B. Rhodes, and the plaintiff, Robert F. Klepinger, concluded that the then financial condition of said
 3 association and their personal and individual affairs, respectively, were such that to insure against

the possibility of enforced discontinuation of occupancy by the association of rooms in the National Press Building in the District of Columbia which were then the place of conduct of the business of the association, (and which the defendant had engaged under the aforesaid agreement to maintain at his personal or individual expense), it was necessary that a loan of money be obtained. That with the knowledge and encouragement of the defendant and the aforesaid Cooper B. Rhodes, the plaintiff, Robert F. Klepinger, sought and received from his father, the plaintiff, Aaron W. Klepinger and from his uncle, the plaintiff, Warren P. Klepinger, a loan of Five Hundred Dollars (\$500.00), for the purpose of aiding the defendant to meet financial obligations, imposed upon defendant by the agreements aforesaid, incidental to the maintenance of the offices of the aforesaid association, the full amount of which loan the said Robert F. Klepinger paid to the defendant.

V. That to induce to the making of such loan, the plaintiff, Robert F. Klepinger, the defendant and the aforesaid Cooper B. Rhodes, joined in the execution of a promissory note dated July 23, 1940, in the amount of \$500.00, payable to the plaintiffs, Warren P. Klepinger and Aaron W. Klepinger, "nine months after date", with interest at six (6) per centum per annum, which note the said makers thereof sent to the said payee thereof, in a letter of which the following is a copy:

Law Offices
Rhodes, Klepinger and Rhodes
National Press Building
Washington, D. C.

Fred B. Rhodes
Cooper B. Rhodes
Robert F. Klepinger

Telephones
District 6491
6492

July 19, 1940

Messrs. A. W. and W. P. Klepinger,
2128 Third Avenue,
Los Angeles, California.

Gentlemen:

In consideration of a loan of \$500.00 evidenced by note dated July 23, 1940 given in said sum, we agree that for your protection in the repayment of said loan, we hereby assign all our fees in the first judgments to be awarded in the U. S. Court of Claims in the cases now represented by this office and agree to consider the same as a trust fund for your benefit.

4

Very truly yours,

Rhodes, Klepinger and Rhodes

By Fred B. Rhodes

Cooper B. Rhodes

Robert F. Kepinger

VI. That the plaintiffs, Robert F. Klepinger, Aaron W. Klepinger, and Warren P. Klepinger deemed and regarded the aforesaid letter of July 19, 1940 as a declaration of trust by the subscribers thereto, and the said Robert F. Klepinger was informed by the defendant that the latter too so deemed and regarded it; and the said Robert F. Klepinger advised the said Aaron W. and Warren P. Klepinger that the aforesaid letter evidenced a document that was efficacious in law to bind and obligate the subscribers thereto as trustees of such part or portion of "all our fees in the first judgments to be rendered in the U. S. Court of Claims in the cases now represented by this office" as would be necessary to repay the aforesaid loan of \$500.00 with interest thereon at 6 per centum per annum, and the said Aaron W. Klepinger and Warren P. Klepinger accepted the aforesaid letter in the belief that it indeed had such efficacy in law.

VII. That also in July 1940, and with the knowledge and encouragement of the defendant and the aforesaid Cooper B. Rhodes, the plaintiff, Robert F. Klepinger, sought and received from his sister, the plaintiff, Miriam Klepinger, a loan of Two Hundred and Thirty Dollars (\$230.00) for the purpose of aiding the defendant to meet financial obligations incidental to the maintenance of the offices of the aforesaid association, the full amount of which loan the said Robert F. Klepinger paid to the defendant. That the said Robert F. Klepinger then and there intended that the trust of fees which had been created by them and the aforesaid Cooper B. Rhodes for the benefit of the plaintiffs, Aaron W. and Warren P. Klepinger, as stated in paragraphs V and VI of this complaint should be maintained also for the purpose, and be charged with, repayment of the aforesaid loan by the plaintiff, Miriam Klepinger.

VIII. That in April 1941, and with the knowledge and encouragement of the defendant, the plaintiff, Robert F. Klepinger, sought and received from the plaintiff,
 5 George F. Evanson, a loan of Nine Hundred (\$900.00), receipt of the full amount of which the defendant acknowledged in a memorandum to the said Robert F. Klepinger, as follows, to wit:

Law Offices
 Rhodes, Klepinger and Rhodes
 National Press Building
 Washington, D. C.

Fred B. Rhodes
 Cooper B. Rhodes
 Robert F. Klepinger

Telephones
 District 6491
 6492

April 2, 1941

Memorandum for Mr. Klepinger

This will acknowledge receipt of two cash advances (loans) which you have obtained from your friend Captain

George Evanson, American Export Lines, New York City, of \$450.00 each, totaling \$900.00.

As you know, this sum is being used to purchase cosmetics from wholesale suppliers in connection with a contract dated January 9, 1941 (as modified on March 7, 1941) between the Marlene Company of this city, and the Tit Tat Toe Company, also of this city.

You are familiar with the situation as related above, and therefore you may have no hesitancy in assuring Captain Evanson that the total sum of \$900.00 will be repaid him by the Marlene Company not later than May 1, 1941.

Fred B. Rhodes.

IX. That no part of any of the amounts which were borrowed by the plaintiff, Robert F. Klepinger, for the use of defendant, and delivered by Robert F. Klepinger to the defendant, as aforesaid, had been repaid in February, 1942. That, however, the defendant had theretofore and subsequent to July 19, 1940 received fees in cases in the Court of Claims in which the petitioners or claimants were represented by said association, which fees he, and the aforesaid Cooper B. Rhodes and the said Robert F. Klepinger had obligated themselves to hold as a trust fund for the benefit of the plaintiffs, Aaron W. and Warren P. Klepinger, as more fully alleged in the Vth and VIth paragraphs of this complaint. That because the defendant had not applied such fees pursuant to the terms of such trust thereof, the said Robert F. Klepinger, as one of the three co-trustees of such fees, insisted that the defendant, in February 1942, render an accounting for them.

6 The defendant refused to make such accounting.

The plaintiff, Robert F. Klepinger, thereupon proposed to the defendant that future fees earned in cases in the Court of Claims, at least to the extent of the amounts owing to the plaintiffs, Aaron W. and Warren P. Klepinger, Miriam Klepinger, and George F. Evanson, be made payable to him, the said Robert F. Klepinger, as their representative. In the discussion of such proposal, defendant

requested of the said Robert F. Klepinger a further loan in the sum of Two Hundred and Fifty Dollars (\$250.00), which the latter engaged to make if the defendant acceded to the aforesaid proposal. That thereupon the defendant executed and delivered to the said Robert F. Klepinger three documents of which the following are copies:

Law Offices
Rhodes, Klepinger and Rhodes
National Press Building
Washington, D. C.

Fred B. Rhodes
Cooper B. Rhodes
Robert F. Klepinger

Telephones
District 6491
6492

February 11, 1942

Assignment

I hereby assign and transfer to Robert F. Klepinger the sum of \$1980.00, out of the fee of \$2919.19, payable to Rhodes, Klepinger and Rhodes in the case of North Pacific Emergency Export Association, #45190, U. S. Court of Claims (decided January 5, 1942, judgment of \$11,679.97), and this assignment shall constitute and be regarded as an attorney's lien on said fee in favor of Robert F. Klepinger to insure collection and payment of the sum of \$1980.00 aforesaid representing certain loans in that amount made heretofore by Robert F. Klepinger and Fred B. Rhodes.

Fred B. Rhodes

Law Offices
Rhodes, Klepinger and Rhodes
National Press Building
Washington, D. C.

Fred B. Rhodes
Cooper B. Rhodes
Robert F. Klepinger

Telephones
District 6491
6492

February 11, 1942

Memorandum for Mr. Robert F. Klepinger

I have this day executed an assignment to you in the sum of \$1980.00, out of the fees due this office in the North Pacific Emergency Export Case. As you know, the total fee is \$2,919.19, judgment entered January 5 of this year. This judgment should be appropriated by the latter part of March or possibly earlier, and paid immediately thereafter.

Kindly repay promptly the loan of \$1,000.00 to G. F. Evanson out of this assignment, either in cash if he should be in the United States at the time, or if not, then purchase a bank certificate of deposit in that sum and see that
7 it is delivered to his representative. Also furnish him with this letter or a copy, and attach a copy of the opinion of the court in the above case.

Fred B. Rhodes

Law Offices
Rhodes, Klepinger and Rhodes
National Press Building
Washington, D. C.

Fred B. Rhodes
Cooper B. Rhodes
Robert F. Klepinger

Telephones
District 6491
6492

February 11, 1942

Memorandum for Mr. Robert F. Klepinger

The assignment to you this day executed by me in the sum of \$1980.00, will insure payment of the following loans: G. F. Evanson; A. W. Klepinger; and Miriam Klepinger as per checks and notes on the books of this office.

Fred B. Rhodes.

That following the execution of the aforesaid documents by the defendant, the plaintiff, Robert F. Klepinger, on February 14, 1942, paid to the defendant the sum of Two Hundred and Fifty Dollars (\$250.00), in anticipation of which payment to him he included the said amount in the aforesaid sum of \$1980.00, plus \$100.00 for the use of the \$900.00 that had been advanced to him by the aforesaid Evanson, thereby accounting for the sum of \$1980.00, as follows: To the plaintiffs, Aaron W. and Warren P. Klepinger, \$500.00; to the plaintiff, Miriam Klepinger, \$230.00; to the plaintiff, George F. Evanson, \$1,000.00; and to the plaintiff, Robert F. Klepinger, \$250.00.

X. That the plaintiff, Robert F. Klepinger, deemed and regarded the aforesaid "Assignment" by the defendant, dated February 11, 1942, as an assumption or creation by the said defendant of a trust of the sum of \$1980.00 and that thereby the defendant had charged himself as a trustee of said sum as soon as it should come into his possession and was informed by the said defendant that he too so deemed and regarded it, and accordingly, the said Robert F. Klepinger immediately thereafter advised the plaintiffs, Aaron W. and Warren P. Klepinger, Miriam Klepinger and George F. Evanson that by an act of the said defendant there had inured to the said Robert F. Klepinger an "attorney's lien" on the fee referred to in the aforesaid assignment of February 11, 1942 for
 8 and on their behalf, and enforceable by him, if necessary, in an action or suit by him against the defendant.

XI. That in the period from September 1, 1942 to December 29, 1942 the fee payable to the association of Rhodes, Klepinger and Rhodes for professional services in the North Pacific Emergency Export Association case,—which is the fee referred to in that "Assignment" by the defendant of February 11, 1942 which is set out in the IXth paragraph of this complaint,—was paid to the defendant, and in said period the plaintiff, Robert F.

Klepinger, acting by and through a member of the District of Columbia bar, made demand upon the defendant for performance of his trust under the aforesaid "Assignment" and for discharge of the "attorney's lien" created thereby. That in response to such demand, which was made repeatedly in several interviews between such member of such bar and the defendant, the latter admitted (1st) execution by him of the aforesaid "Assignment" of February 11, 1942, (2d) that no obligation whatever by him thereunder to anyone had yet been discharged, (3d) that he had received the fee to which reference is made in the aforesaid "Assignment", and (4th) that he had in his possession as a part of the said fee the sum of \$1980.00. That, however, the defendant refused to comply with such demand and informed such member of such bar that he would continue to refuse to do so unless or until the said Robert F. Klepinger had submitted to the defendant (1st) copies of the Federal income tax returns by the said Robert F. Klepinger for calendar years 1940, 1941 and 1942, and (2d) a statement by the said Robert F. Klepinger responsive to inquiries by the defendant concerning certain of the business or affairs of the aforesaid association. That neither any of such income tax returns by the said Robert F. Klepinger nor any of the business or affairs of the aforesaid association to which the defendant's inquiries related, pertained to any matter or thing having relevancy to the confessed indebtedness of the defendant to the plaintiffs, Aaron W. and Warren P. Klepinger, Miriam Klepinger, George F. Evanson, or to the aforesaid loan of \$250.00 which was made by the said Robert F. Klepinger to the defendant on February 14, 1942, as aforesaid. That whatever relevancy they might have in an action or suit for an accounting brought by or

9 against the said Robert F. Klepinger or by or
 against the defendant, could not be availed of to defend, justify, or excuse the defendant's refusal to dis-

charge his trust and the "attorney's lien" under the "Assignment" of February 11, 1942, as aforesaid.

XII. That in aid both of preparation and presentation of their case under this complaint, and because the plaintiffs, Aaron W. Klepinger, Warren P. Klepinger, Miriam Klepinger, and George F. Evanson, have no knowledge concerning fees earned in cases in the Court of Claims and paid to the defendant subsequent to July 25, 1940, when the plaintiff, Robert F. Klepinger, began the "leave of absence for one year * * * from the firm of Rhodes, Klepinger and Rhodes", as alleged in the IIIId paragraph hereof, there is annexed to this complaint for service therewith on the defendant, interrogatories to him as provided for in Rule 33 of the Federal Rules of Civil Procedure.

Wherefore the plaintiff demands (1st) appropriate process to the defendant requiring discharge or performance by him of the obligation of his trust under his aforesaid "Assignment" of February 11, 1942, or, but only if such process is unavailing to effectuate such discharge or performance, that an order be passed for entry of judgments against the defendant, as follows: In favor of the plaintiffs Aaron W. Klepinger and Warren P. Klepinger, in the sum of Five Hundred Dollars (\$500.00), with interest thereon at six per centum yearly from July 23, 1940; in favor of the plaintiff, Miriam Klepinger, in the sum of Two Hundred and Thirty Dollars (\$230.00); in favor of the plaintiff, George F. Evanson, in the sum of \$1000.00, and in the favor of the plaintiff, namely, Robert F. Klepinger, in the sum of Two Hundred and Fifty Dollars (\$250.00); and for costs.

PATRICK H. LOUGHRAN,
1147 Connecticut Ave., N. W.,
Attorney for the Plaintiffs.

10 Endorsed: Filed Apr 27 1943 Charles E. Stewart,
Clerk

Exhibit A to Complaint

Agreement

Made this 25th day of June, 1938, by and between Fred B. Rhodes, Cooper B. Rhodes, Robert F. Klepinger and Carl H. Willingham.

Whereas, the parties hereto are now associated together in the practice of law and desire to continue said association and to agree upon the terms and conditions upon which such association shall be continued and maintained.

Now Therefore, These Presents Witnesseth, that the parties hereto, for and in consideration of their mutual promises and agreements hereinafter set forth, and other good and valuable consideration, do hereby agree, promise and covenant each with the other as follows:

1. That this agreement shall take effect on and after July 1, 1938.

2. That from and after the effective date of this agreement the parties hereto shall be associated in the practice of law, and shall engage in such practice together under the firm name and style of Rhodes, Klepinger & Rhodes, subject to the terms and conditions hereinafter set forth.

3. That said Fred B. Rhodes shall provide, for the use of the parties hereto, such adequate offices, secretarial and clerical services, office furnishings and equipment and telephone service, as may be justified and made necessary by the amount of business transacted from time to time and the amount of the income received as a result of the business transacted in said offices; that said Fred B. Rhodes shall, as heretofore, have complete administrative control over said offices and the business transacted therein, including the right to select and allocate office space, engage and discharge clerks and other assistants, fix and determine the salaries or wages of all clerks and other assistants employed in said offices, assigning cases and duties to

the parties hereto, and to decide and determine all matters and questions of policy affecting the business conducted in said offices and by the parties hereto; and the other parties to this agreement shall not, without the consent of

11 Fred B. Rhodes, enter into any contract affecting the conduct of the business of the parties hereto.

4. That all fees received by the parties hereto, or any of them, shall, except as provided in paragraphs 5, 6, 7 and 8 below, be divided and distributed among the parties hereto, as follows: Fred B. Rhodes, forty-five per cent (45%); Cooper B. Rhodes, twenty per cent (20%); Robert F. Klepinger, twenty per cent (20%); Carl H. Willingham, fifteen per cent (15%).

5. That the terms of the foregoing paragraph shall not apply to such fees as may be received in any of the following matters or cases: (1) Claims of Railway Postal Clerks, for the recovery of which test suits are now pending in the District Court of the United States for the District of Columbia; (2) The twenty-four (24) claims of employees or former employees of the Mare Island Navy Yard whose suits are now pending in the United States Court of Claims; (3) The claims of employees or former employees of the Navy Yard at Portsmouth, Virginia, for overtime compensation; (4) The case of General Contracting and Construction Company vs. United States; (5) The matter of the sale of the Shaw Water Gardens; (6) The case of Gormley vs. United States; (7) The case of Ouilmette Construction Company vs. United States; (8) The claims of former Government employees, for overtime compensation, who were represented in the Court of Claims by Fred B. Rhodes and whose claims have been reported by the Court of Claims (the claims commonly known to the parties hereto as the "Eight-Hour Day Cases"). The fees received for services rendered in all of these matters or cases shall be distributed in accordance with agreements heretofore made by and between such of the parties hereto

as have been employed or engaged in such matters or cases.

6. That the fees received as a result of the prosecution of claims filed pursuant to the provisions of the Act of Congress which was introduced in the Seventy-fifth Congress as S. 3628, by the thirty (30) claimants now represented by this office (including the twenty-seven (27) claimants who have furnished powers of attorney to the parties hereto, and the Douglas Aircraft Company, Myrtle Desk Company and the High Point Bending and Chair Company), shall be divided and distributed as follows: Fred B. Rhodes, forty-five per cent (45%); Robert F.

Klepinger, twenty-five per cent (25%); Cooper B. 12 Rhodes, twenty per cent (20%); Carl H. Willingham, ten per cent (10%).

7. That should any one or more of the parties hereto, as a result of his or their own sole and individual efforts, contacts or influence, cause the parties hereto, or any of them, to be employed on an annual retainer basis, and if the retainer fee in such instance shall be at a rate or in an amount in excess of two thousand dollars (\$2,000.00) per year; then and in that event, the party or parties whose efforts, contacts or influence resulted in such employment, shall receive one-third ($1/3$) of the retainer fees received as a result of such employment, and the remaining two-thirds ($2/3$) of such fees shall be divided and distributed as provided in paragraph 4, above.

8. That if, in the prosecution or handling of any matter, claim or case by any of the parties hereto, it shall be necessary or advisable for the parties hereto, or any of them, to engage or retain the service of any other person, persons, firm, or corporation, or if any other attorney shall be entitled to, or have an interest in, any part of any fee or fees received for services rendered by any of the parties hereto, or if it should become necessary for any of the parties hereto to incur any expense for travel in connection with the handling of any case or matter in which the

parties hereto are interested, then and in that event the expense of said services, the amount due such other attorney, and/or the amount of such travel expense, shall be deducted from the fee received by the parties hereto in any such matter or case (and shall be repaid to the party who shall have advanced such amount or amounts) before a division or distribution of such fee is made, and in such case the net amount of the fee remaining after such deduction or deductions as are provided for in this paragraph shall be divided and distributed in accordance with the term of the preceding paragraphs of this agreement.

9. That this agreement may be terminated at any time, on such terms as may be agreed upon, by the consent of all of the parties hereto; and any of the parties hereto may withdraw from his association with the other parties to this contract upon thirty (30) days' notice in writing. The said Fred B. Rhodes shall have the right and power to remove and discharge, from the association herein provided, any of the other parties hereto. Any such party who is so removed or discharged, or who shall withdraw as provided above, shall thereafter receive his proper share of fees which may have been earned and uncollected on the date of such withdrawal, removal or discharge, and in addition thereto he shall be entitled to receive, from such fees as shall thereafter be earned and collected in connection with cases which are pending and being handled by the parties hereto on the date of such withdrawal, discharge or removal, a fair and equitable portion of the share of the fees which he would have received if he had not withdrawn or had not been discharged or removed; and, in determining the amount of such portion, the progress and status of such cases at the time of such withdrawal, discharge or removal shall be a determining factor. The said Fred B. Rhodes shall have the right to add other attorneys to the association which is hereby provided, and in such event an equitable arrangement of fee divisions shall be made to provide for the

proper compensation of such additional attorney or attorneys.

10. That, should any dispute or disputes arise between any of the parties hereto under the terms and conditions of paragraph 9 above, or with respect to the division of any fee or fees earned by any of the parties hereto, such dispute or disputes shall be settled and determined by a board of arbitration whose decision shall be final and binding upon all of the parties hereto and which shall be selected as follows: One arbitrator to be selected by each of the parties hereto, and an additional arbitrator to be selected by the arbitrators selected by the parties hereto. The expense of such arbitration, if any, shall be born equally by all of the parties hereto.

FRED B. RHODES	SEAL
COOPER B. RHODES	SEAL
CARL H. WILLINGHAM	SEAL
ROBERT F. KLEPINGER	SEAL

14 Endorsed: Filed Apr 27 1943 Charles E. Stewart,
Clerk

Exhibit B to Complaint

Memorandum of Agreement
Washington, D. C.

July 25, 1940

Whereas, it is desired that Robert F. Klepinger take a leave of absence for one year from the date of this agreement from the firm of Rhodes, Klepinger and Rhodes, under the agreement of June 25, 1938, the following agreement is hereby entered into:

The firm name of Rhodes, Klepinger and Rhodes will be used by Fred B. Rhodes and Cooper B. Rhodes for a period of one year from the date hereof after which time a further agreement will be entered into by the parties hereto. In view of the fact that it will be necessary to secure assist-

ants to prosecute the litigation now pending wherein said firm are attorneys, the said Klepinger authorizes the said Fred B. Rhodes and Cooper B. Rhodes to employ such assistants as they may require in the prosecution of said litigation. It is understood that the said Klepinger shall not be obligated in any way to assist in prosecution of such litigation or to be obligated financially in any way for expenses in maintaining quarters, rent, telephone, stenographic assistance, etc., in connection with prosecution of said litigation.

In lieu of the compensation provided in said agreement of June 25, 1938, said Robert F. Klepinger shall receive the following:

1. Out of the first fees in excess of \$5,000.00 received by Rhodes, Klepinger and Rhodes, from judgments in the 65 so called N. R. A. cases now pending in the U. S. Court of Claims under the Act of June 25, 1938, the sum of \$2,000.00; should the total fees received from judgments in those cases exceed the sum of \$25,000, said Klepinger shall receive an additional \$3,000.00, making a total payment of \$5,000, which he shall accept in full payment for his services in connection with prosecution of those claims to date and in assisting to secure enactment of the said Act of June 25, 1938.

2. One third of the fees in the 24 so called Mare Island overtime pay cases now pending in the Court of Claims in which proof has been closed and plaintiff's proposed findings of fact prepared by said Klepinger and submitted, and in addition, the sum of \$150.00, will be paid him out of the fees in said cases as reimbursement for travelling expenses to San Francisco advanced by him in taking plaintiff's testimony in August, 1938.

3. Ten percent of the net fees in other cases now pending in the Court of Claims, in which litigation said Rhodes, Klepinger and Rhodes are attorneys, except those otherwise specifically referred to herein.

4. Twenty-five percent of any net fees paid to either Rhodes, Klepinger and Rhodes, or to Robert F. Klepinger growing out of group insurance claims, or the so called civil service retirement claims, or the so called Government "outstanding liability" claims. This agreement shall apply to all claims of these classes which may hereafter be placed for prosecution with any of the parties hereto.

The said Fred B. Rhodes further agrees to execute a note to said Robert F. Klepinger in the sum of \$4158.27, payable one year from the date hereof, (which sum represents the latter's share of fees unpaid in cases in which fees have been received by said Rhodes, Klepinger and Rhodes and includes personal loans made to said Fred B. Rhodes by said Robert F. Klepinger.

The said Robert F. Klepinger may if he desires, upon execution of this agreement remove his files and effects from the offices of Rhodes, Klepinger and Rhodes, and all books owned by him including the Supreme Court Reporter (62 volumes) and Supreme Court, Law Edition reports (13 volumes) under the agreement of April 12, 1938, and volumes 2, 3, 5-15, 17-28, 30, 31, 71-82 Court of Claims reports.

In Witness Whereof the Said Parties Have Hereto Set Their Hands and Seals this 25th Day of July 1940.

FRED B. RHODES
COOPER B. RHODES
ROBERT F. KLEPINGER

FRANCES L. SHUTTERS

Witness

* *

16 Endorsed: Filed Apr 27 1943 Charles E. Stewart,
Clerk

*Interrogatories to be Answered Under Oath by the
Defendant as Provided by Rule #33, Federal Rules
of Civil Procedure*

I. State the titles and docket numbers of the cases in the Court of Claims of the United States, in which the petitioners or claimants were represented "by this office" (within your understanding of the meaning of the phrase, to wit, "by this office" as applied to the office of Rhodes, Klepinger and Rhodes on July 19, 1940), in which judgments were entered in favor of the claimants or petitioners in the period from July 19, 1940 to February 11, 1942.

2. State, with reference to each of such cases, the
17 total amount of fees received "by this office",—
within your understanding of that phrase under its application as stated in Interrogatory 1,—or by anyone, in the period from July 19, 1940 to February 11, 1942.

3. State, with reference to each of such cases, the disposal that was made of the fees therein that were received "by this office", within your aforesaid understanding of the phrase "by this office", and the interest therein, or distributive share thereof, of yourself, Cooper B. Rhodes, and Robert F. Klepinger, respectively, under the agreements of association copies of which are exhibits "A" and "B" to the complaint in this cause.

4. Has payment to Rhodes, Klepinger and Rhodes been made of the fee "in the case of North Pacific Export Association, #45190, U. S. Court of Claims"? If so, state date of the payment and the amount of the payment.

5. If the fee referred to in Interrogatory 4 has been paid to Rhodes, Klepinger and Rhodes, what sum, if any, out of the amount thereof, is now held by the said association, or by you, or by anyone else for payment to Robert F. Klepinger? If any amount is now so held, by whom is it

now held and how is it now held, that is to say, is it now held in currency, or now held under a bank credit, or now held in some form of security, and if held under a bank credit or under a form of security, state the name and location of the bank and the name of its debtor, or describe the security and state the name in which it is transferable.

6. If the answer to Interrogatory 5 is that there is a sum held for payment to Robert F. Klepinger, then state what is regarded as justifying cause for non-payment thereof to him. If what is esteemed as such cause is that he has not delivered to you copies of his income tax returns for calendar years 1940, 1941 and 1942, or that he has not responded to inquiries by you concerning business or affairs of the association of Rhodes, Klepinger and Rhodes, then state wherein such copies and such business or affairs are deemed by you to be relevant in respect of the duty or obligation to hold such sum for payment to Robert F. Klepinger.

PATRICK H. LOUGHRAN,
1147 Connecticut Ave., N. W.,
Attorney for Plaintiffs.

* * * * *

18 Endorsed: Filed May 19 1943 Charles E. Stewart, Clerk.

Motion to Dismiss

Now comes the defendant, Fred B. Rhodes, and moves to dismiss complaint upon the following grounds:—

1. That the amount claimed is not within the jurisdiction of this Court.

JACOB N. HALPER
Attorney for Defendant

* * * * *

19 Endorsed: Filed Jun 10 1943 Charles E. Stewart, Clerk.

Judgment Dismissing Complaint

This action came on to be heard at this term on the motion of the defendant to dismiss the complaint for want of jurisdiction in equity, and thereupon, upon consideration hereof, it is this 10th day of June 1943 Adjudged as follows:

1. That the said motion be, and the same hereby is, sustained, and the complaint is hereby dismissed upon the ground that the complaint fails to state a cause for relief in the nature of equity.

EDWARD C. EICHER

Chief Justice

I certify that I mailed a copy of the foregoing proposed order on June 7, 1943, to Patrick H. Loughran, 1147 Connecticut Avenue, Washington, D. C., attorney for plaintiff by mail, postage prepaid.

JACOB N. HALPER

Attorney for Defendant

* * * * *

20 Endorsed: Filed Jun 15 1943 Charles E. Stewart, Clerk.

Order in the Matter of Security for Costs on Appeal

For purposes of record action by the Court on the oral suggestion by the attorney for the plaintiffs in the matter of security for costs on appeal, which he made in open court on the 2d day of June 1943 and after announcement by the Court of its conclusion that the defendant's motion to dismiss should be granted, it is by the Court, this 15th day of June, 1943,

Ordered, That security for costs on appeal from the judgment entered herein on June 10, 1943 be and the same is

hereby fixed at the sum of One Hundred Dollars (\$100.00), with leave to the plaintiffs either to furnish an undertaking, with approved surety, in that amount or to deposit currency in said sum with the Clerk of this Court.

EDWARD C. EICHER
Chief Justice.

Memorandum

June 21, 1943. Cost Bond on Appeal \$100.00 approved and filed.

* * * * *

21 Endorsed: Filed Jun 21 1943 Charles E. Stewart, Clerk.

Notice of Appeal to the United States Court of Appeals for the District of Columbia.

Notice is hereby given that Robert F. Klepinger, Miriam Klepinger, Aaron W. Klepinger, Warren P. Klepinger and George F. Evanson, all the plaintiffs in the above entitled cause, hereby appeal to the United States Court of Appeals for the District of Columbia from the final judgment dismissing the complaint herein for the assigned reason, to wit, that it "fails to state a cause for relief in the nature of equity", which was entered in this action on June 10, 1943.

PATRICK H. LOUGHRAN,
Attorney for all Appellants,
600 F Street, N. W., Washington, D. C.

* * * * *

22 Endorsed: Filed Jun 21 1943 Charles E. Stewart, Clerk.

Appellants' Designation of Record on Appeal

The Clerk will please prepare the record on appeal herein and include therein the following:

1. Complaint, the exhibits thereto and the Interrogatories under the 33d of the Rules of Civil Procedure, all filed April 27, 1943.

2. Motion to dismiss for the assigned reason, to wit, "That the amount claimed is not within the jurisdiction of this Court", filed May 19, 1943.

3. Judgment, entered June 10, 1943, dismissing the complaint "upon the ground that the complaint fails to state a cause for relief in the nature of equity."

4. Order in the matter of security for costs on appeal, filed June 15, 1943.

5. Entered note or memorandum relating to filed undertaking for security for costs on appeal.

6. Notice of appeal, filed June 21, 1943.

7. This designation.

PATRICK H. LOUGHRAN

Attorney for Appellants.

Receipt of a complete and true copy of the foregoing designation, through service thereof on me is acknowledged this 21 day of June 1943.

JACOB N. HALPER

Attorney for Appellee.

Above designation satisfactory

JACOB N. HALPER

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